

Notice of Allowability

Application No.

10/646,609

Examiner

Jyoti Chawla

Applicant(s)

BUHLER ET AL.

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance (PTOL-85) or other appropriate communication will be mailed in due course. **THIS NOTICE OF ALLOWABILITY IS NOT A GRANT OF PATENT RIGHTS.** This application is subject to withdrawal from issue at the initiative of the Office or upon petition by the applicant. See 37 CFR 1.313 and MPEP 1308.

1. ☒ This communication is responsive to Amendment after Non-Final of 9/20/07.
2. ☒ The allowed claim(s) is/are 2-4,6-30,45 and 47-59.
3. ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some* c) ☐ None of the:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

* Certified copies not received: _____.

Applicant has THREE MONTHS FROM THE "MAILING DATE" of this communication to file a reply complying with the requirements noted below. Failure to timely comply will result in ABANDONMENT of this application.
THIS THREE-MONTH PERIOD IS NOT EXTENDABLE.

4. ☐ A SUBSTITUTE OATH OR DECLARATION must be submitted. Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL PATENT APPLICATION (PTO-152) which gives reason(s) why the oath or declaration is deficient.
5. ☐ CORRECTED DRAWINGS (as "replacement sheets") must be submitted.
- (a) ☐ including changes required by the Notice of Draftsperson's Patent Drawing Review (PTO-948) attached
- 1) ☐ hereto or 2) ☐ to Paper No./Mail Date _____.
- (b) ☐ including changes required by the attached Examiner's Amendment / Comment or in the Office action of Paper No./Mail Date _____.
- Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the drawings in the front (not the back) of each sheet. Replacement sheet(s) should be labeled as such in the header according to 37 CFR 1.121(d).
6. ☐ DEPOSIT OF and/or INFORMATION about the deposit of BIOLOGICAL MATERIAL must be submitted. Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Attachment(s)

- | | |
|--|---|
| 1. <input type="checkbox"/> Notice of References Cited (PTO-892) | 5. <input type="checkbox"/> Notice of Informal Patent Application |
| 2. <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 6. <input checked="" type="checkbox"/> Interview Summary (PTO-413),
Paper No./Mail Date <u>12/7/07</u> . |
| 3. <input type="checkbox"/> Information Disclosure Statements (PTO/SB/08),
Paper No./Mail Date _____ | 7. <input checked="" type="checkbox"/> Examiner's Amendment/Comment |
| 4. <input type="checkbox"/> Examiner's Comment Regarding Requirement for Deposit
of Biological Material | 8. <input checked="" type="checkbox"/> Examiner's Statement of Reasons for Allowance |
| | 9. <input type="checkbox"/> Other _____. |

Art Unit: 1794

REASONS FOR ALLOWANCE

Applicant's submission filed on September 20, 2007 has been entered.

Examiner's Amendment

An examiner's amendment to the record appears below. Should the changes and/or additions be unacceptable to applicant, an amendment may be filed as provided by 37 CFR 1.312. To ensure consideration of such an amendment, it **MUST** be submitted no later than the payment of the issue fee.

Authorization for this examiner's amendment was given in a telephone interview with John Munger on December 7, 2007.

Please amend claim 17 to read as follows:

17. A packaged butter-flavored topping product comprising:

- a pressurized container; and
 - a refrigerated butter-flavored topping composition within and dispensable from the pressurized container comprising:
 - more than about 50% by weight water;
 - over 40% by weight whole milk;
 - Over 25% by weight heavy cream;
 - about 10-16% by weight bulking agent;
 - less than about 1% by weight butter flavoring; and
 - the topping composition having a fat content of about 13-16% by weight[.]
- and an overrun of about 250-350% .

Please amend claim 45 to read as follows:

45. A packaged butter-flavored topping product comprising:

- a pressurized container; and
- a refrigerated butter-flavored topping composition within and dispensable from the pressurized container comprising:
 - more than about 50% by weight water;
 - about 13-16% by weight fat;
 - about 0.02- to less than about 4% by weight emulsifier;
 - about 10-16% by weight bulking agent;
 - about 1-5% by weight milk powder;
 - about 1-5% by weight protein; and
 - butter flavoring in an amount sufficient to impart a butter flavor to the topping composition [·].

whereby the topping composition has an overrun of about 250-350% when dispensed from the pressurized container.

Please amend claim 49 to read as follows:

49. A packaged butter-flavored topping product comprising:

- a pressurized container; and
- a refrigerated butter-flavored topping composition within and dispensable from the pressurized container comprising:
 - about 50% by weight or more water;
 - about 13-16% by weight fat;
 - emulsifier in an amount sufficient to provide the topping composition with an overrun in excess of about 250 -350 % when the topping composition is dispensed from the pressurized container;
 - about 10-16% by weight bulking agent;

Art Unit: 1794

- protein in an amount sufficient for foaming of the composition; and
- butter flavoring in an amount sufficient to impart a butter flavor to the topping composition.

Please amend claim 55 to read as follows:

55. The ~~[composition]~~ topping product of claim 49 wherein the ~~[further comprising]~~ protein is present in an amount of about 1-5% by weight [protein].

Please cancel claim 46.

Reasons for Allowance

The following is an examiner's statement of reasons for allowance:

Excerpt from Mr. Konar's declaration which shows experimental proof that the closest prior art of Lynch does not behave the same way as the instantly claimed invention when Lynch reference is modified to increase the fat component to 13-16% as is instantly claimed, thus overcoming the obviousness rejection.

The instantly claimed invention is a butter flavored topping with 13-16% fat content , which can be dispensed from a pressurized container and has an overrun of about 250-350%, wherein the composition remains stable for at least 10 minutes after being dispensed from a pressurized container. Butter flavored topping compositions have been known in the art. Lynch, of record teaches of a low fat butter flavored topping composition, however, Lynch teaches of up to 7% fat in the composition (Abstract, Column 4, line 27 to Column 5, line 25), as compared to the instantly recited fat content of 13-16%. Lynch also does not teach packaging the product in a pressurized container. Further Lynch does not teach the stability of the topping after being dispensed either from a tube or a pressurized container as recited in the independent claims 17, 26, 28, 45 and 49. Other references Gonsalves and Solms-Baruth, also of record were included to overcome the deficiency of the Lynch reference by increasing the amount of fat and dispensing the resultant composition from a pressurized container. The applicant's submitted an affidavit with experimental data, Konar declaration of December 22, 2006, also of record, wherein if the fat content of Lynch references is increased to make it comparable to the instantly claimed composition, the resulting modified Lynch does not behave the same way as the instantly claimed invention. According to Konar declaration "one-week-old refrigerated Lynch compositions stored in the pressurized containers and having fat contents of 7%, 13% and 16% all appeared to have thickened and congealed" and "the Lynch compositions did not flow easily from the containers. Both the 13% and 16% fat compositions seemed to be stuck in the containers and dispensed slowly and irregularly from the containers, in a sputtering, spitting manner. The Lynch compositions did not form well-defined rosettes once dispensed from the containers."

Art Unit: 1794

Konar declaration also pointed out that "In contrast, compositions made according to the Buhler compositions at fat contents of 13% and 16% flowed quickly and easily from the containers to form well-defined rosettes with sharp, defined edges and a light, airy appearance." The applicant has also submitted pictures in support of the experimental observations. Thus one of ordinary skill in the art would not have expected, nor could have predicted, the unexpected results of combining 13-16% fat and modifying Lynch would result in a composition which would not behave in desired manner as instantly claimed. Based on the above information it is evident that the instantly claimed invention is not obvious over the closest prior art of record.

Any comments considered necessary by applicant must be submitted no later than the payment of the issue fee and, to avoid processing delays, should preferably accompany the issue fee. Such submissions should be clearly labeled "Comments on Statement of Reasons for Allowance."

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jyoti Chawla
Examiner
Art Unit 1794



KEITH D. HENDRICKS
SUPERVISORY PATENT EXAMINER